JD(SF)-88-03
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SARA LEE BAKERY GROUP, d/b/a INTERNATIONAL BAKING COMPANY AND EARTHGRAINS

and **Cases 21-CA-35073**
21-CA-35075
21-CA-35090
21-CA-35146
21-CA-35153
21-CA-35224

BAKERY, CONFECTIONERY AND TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 37, AFL-CIO, CLC **21-CA-35371**
21-CA-35372
21-RC-20465

Stephanie Cahn, Esq., Los Angeles, CA, for the General Counsel.
Timothy A. Davis, Esq., and *Kimberly F. Seten, Esq.,* Kansas City, MO, for the Respondent.
Bernhard Rohrbacher Esq., Pasadena, CA, for the Charging Party.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Los Angeles, California, on August 25 through 28, 2003. Bakery, Confectionery and Tobacco Workers and Grain Millers International Union, Local 37, AFL-CIO, CLC (the Union, the Charging Party, or the Petitioner), filed a number of original and amended unfair labor practice charges, as captioned above. Based on those charges as amended, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a consolidated complaint on March 31, 2003. The complaint alleges that Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains (the Respondent or the Employer)[1] violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[2]

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[1] At the hearing, counsel for the General Counsel amended all the formal papers to reflect the correct name of the Respondent. All parties stipulated that the correct name of the Respondent is Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains.

[2] In its answer, the Respondent admits the various dates on which the enumerated original and amended charges were filed by the Union and served on the Respondent as alleged in the complaint.

Pursuant to a petition for an election filed by the Union on April 18, 2002 in case 21-RC-20465, and following a Stipulated Election Agreement between the parties, an election by secret ballot was conducted on July 9 and 10, 2002. The tally of ballots reflected that 62 ballots had been cast for representation by the Petitioner, 237 had been cast against such representation, 8 ballots were challenged, and 1 ballot was void. Challenges were not sufficient in number to affect the results of the election. The Petitioner filed timely objections to conduct affecting the results of the election. Thereafter, on April 16, 2003, the Regional Director for Region 21 issued a report on objections and an order consolidating the objections with the complaint allegations for purposes of trial and resolution before an administrative law judge.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Charging Party, and my observation of the demeanor of the witnesses,[3] I now make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent is a Delaware corporation, with a facility located in Vernon, California, herein called the Vernon facility, where it has been engaged in the manufacture, sale, and distribution of bakery goods to commercial customers. Further, I find that during the 12-month period ending June 13, 2002, which period is representative of the Respondent's operations, the Respondent, in the course and conduct of its business operations, sold and shipped from its Vernon, California facility goods valued in excess of $50,000 directly to points located outside the State of California.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

III. Alleged Unfair Labor Practices

A. The Issues

In substance, the complaint alleges that the Respondent attempted to defeat the Union's campaign to organize the employees at the Vernon facility through the commission of various unfair labor practices.[4] These included the suspension and subsequent discharge of employee Guadalupe Ortiz because he allegedly engaged in union and protected activity, and the discharge of employee Macario Robledo allegedly for similar reasons. It is also alleged that the Respondent violated the Act by threatening employees with a loss of benefits, by creating the impression that their union activities were under surveillance, by threatening employees who may have had improper work documents with a loss of employment, by threatening employees with plant closure, by threatening employees with job loss through the inevitability of a strike, and by promising employees new and/or enhanced benefits as an inducement to abandon their support for the Union.

According to the Respondent, Ortiz was suspended and subsequently discharged for cause, principally because he allegedly made threats of physical violence and other harm against fellow employees. Further, the Respondent contends that Robledo was laid off due to an economic reduction in force. The Respondent denies that its actions toward Ortiz and Robledo were in any way related to their union or protected activities. Also, the Respondent denies that in opposing the Union's organizing campaign it violated the Act in any way. It is the Respondent's position that its supervisors and agents were properly expressing their views without threat of reprisal or force or promise of benefit, as they were entitled to do under Section 8(c) of the Act. The Respondent contends that this was nothing more than the lawful exercise of its freedom of expression.

B. Facts and Analysis

1. Background

The Respondent produces a number of different bakery items, including bagels, pita bread, pound cake and French bread, at its Vernon facility, from which these items are sold and distributed throughout the United States. There were approximately 331 production and maintenance employees employed at the Vernon facility in the petitioned for unit at the time of the representation election on July 9 and 10, 2002.[5] (Jt. Exh. 1a and 1b.) The Union began a campaign to organize these employees during the months of March and April. On April 18, the Union filed a representation petition with the Board seeking an election among this unit of the Respondent's production and maintenance employees at the Vernon facility.

The Respondent vigorously opposed the Union's organizing campaign. Over the course of the campaign, the Respondent's managers and supervisors held approximately 80 meetings with groups of employees. Small group meetings were held in a meeting room above the shipping department. Employees from one or more departments attended these meetings, between approximately 25 and 50 employees. Larger group meetings were held in the shipping area and usually involved an entire shit, approximately 150 employees. It was the unrebutted testimony of the Respondent's witnesses that during each week of the campaign a particular

[4] The issues regarding the objections to the election will be discussed in a later section of this decision.

[5] All dates are in 2002 unless otherwise indicated.

subject or subjects were covered in all the meetings held that week. The message and materials utilized in each set of weekly meetings were essentially the same, exposing all the employees in the petitioned for unit to the same message during the same week. For the most part, the meetings followed a standard format. The management representatives conducting the meetings would utilize a written script and notes. However, the presentations were given without a verbatim reading of the script. A question and answer session usually followed the initial presentation.

The principal presenters at these meetings were Irma Elioff, human resources manager, Sarita Dominguez, human resources supervisor, and Daniel Mani, consultant.[6] It appears that a significant majority of the Respondent's employees are of Hispanic heritage, many of whom speak primarily Spanish, while others may be bilingual. Elioff and Dominguez are also of Hispanic heritage and both are bilingual. This matter is significant because the group meetings were conducted in either English, Spanish, or both languages, depending upon the primary language spoken by the employees who attended specific meetings. Certain statements made by Elioff, Dominguez, and Mani at these group meetings are alleged in the complaint to constitute violations of Section 8(a)(1) of the Act.[7]

Elioff and Dominguez testified at length. Preliminarily, I would note that I was impressed with both women as witnesses. Elioff and Dominguez are clearly intelligent individuals, who have good memories for detail. Their testimony appeared accurate and sincere, without exaggeration or embellishment. Elioff testified in a calm, self-assured way, which left me with confidence that her remembrances were accurate. Domingrez was more emotional, but I was left with the impression that her feelings were genuinely displayed, and were not merely theatrics. Her emotional display, if anything, supported her testimony that she considered the issues she confronted during the campaign to be very serious. Both women appeared to be mature individuals who were dedicated to representing the Employer to the best of their ability, without intentionally violating the law. Their testimony had "the ring of authenticity" to it, and I find them both to be generally credible. Daniel Mani did not testify at the hearing.

2. The Alleged Section 8(a)(1) Statements

It is alleged in paragraph 7(a) of the complaint that at a group meeting in about April 2002, Domiguez and Elioff threatened employees with loss of benefits, including bonuses, vacations, paid leave, and wages, if the Union were selected as their bargaining representative. In support of this allegation, counsel for the General Counsel called a number of employees and former employees to testify. Former employee Guadalupe Ortiz[8] testified that he attended a meeting in April during which Elioff told employees that if the Union were selected as bargaining representative, the Respondent would eliminate a number of their benefits, including receipt of

[6] During some period in the past, Daniel Mani had occupied a position as the chief executive at the Vernon facility. However, at the time of the organizing campaign, he was no longer an employee of the Respondent, but was being utilized as a private consultant. In any event, the Respondent admits that Mani was functioning as its agent. Also, the Respondent acknowledges the agency and supervisory status of both Irma Elioff and Sarita Dominguez.

[7] While it is not possible to determine on what specific dates individual employees attended particular meetings and whether they were conducted in English, Spanish, or a combination, I assume that for any given week all meetings held were intended to discuss similar subjects.

[8] Guadalupe Ortiz is a named discriminatee in the complaint, about whom I will have more to say later in this decision.

"T-shirts," vacations, and "permission" to travel out of the country for a funeral.[9] Griselda Hernandez, an employee temporarily on disability, testified that at a meeting in April, Elioff said that "if the Union came in," the employees would lose all their benefits, and specifically employer provided "gloves, Christmas party, and back support." Current employee Maria Zarco testified that at a meeting in April, Elioff said, "if the Union came in," they were going to lose their current benefits, such as "three weeks vacation" based on "seniority," and the Employer's alleged practice of allowing employees to return to work without "an excuse" after being sick, and to return to work after "going to jail." Also, current employee Miguel Bugarin testified that at a meeting in June, Elioff indicated that "if the Union came in, everything" would be "canceled," including "vacations." Finally, former employee Bella Amar Aguirre testified that at a meeting in April, Elioff said that "when the Union came in, they were going to remove many benefits," including "vacation and holidays," seniority based pay, and if a relative "should pass on abroad," an employee would not receive permission to be absent from work in order to attend the funeral.

Elioff and Dominguez both denied these allegations. They testified that their remarks at these meetings, whether scripted or extemporaneous, were always that wages and benefits would be negotiable if the Union were elected. Both managers testified that they were repeatedly asked about different types of benefits, including vacations, trips to Mexico, overtime, and holidays, and in each instance they explained that if the Union became the employees' bargaining agent, the Respondent would negotiate all the terms and conditions of employment. Specifically, they informed employees repeatedly that wages and benefits could stay the same, go up, or go down, depending on negotiations. The managers testified that, to some extent, employees became impatient with them, because they could not give definitive answers as to what would happen to wages and benefits. Instead, they were forced to repeat that it would all depend on negotiations. According to Elioff, she told the employees that all the Employer was legally required to pay was minimum wage and overtime, and that everything else would be determined through negotiations with the Union.

A number of current employee witnesses called to testify by counsel for the Respondent supported the testimony of Elioff and Dominguez, and indicated that there were no threats to remove benefits. Rather, the managers merely made it clear that if the Union were successful in the election, wages and benefits would all be subject to the negotiation process. These employee witnesses included Estella Moreno, Carmen Fernandez Gonzalez, Francisco Fernandez Tarelo, Candido Vasquez, and Luis Salgado. As I have noted in detail above, I find Elioff and Dominguez to be credible witnesses. Their versions of what was discussed at the meetings in question are inherently more plausible than those told by the General Counsel's witnesses. I simply do not believe that either manager was so bold as to make "blanket statements" indicating that with a Union victory at the election, all employee benefits would be lost, and then allegedly specifying what benefits. I am of the opinion that those witnesses called by the Respondent who supported the testimony of the managers tended to more fully understand the comments of Elioff and Dominguez that all wages and benefits would be negotiable. That is not to suggest that all of the General Counsel's witnesses were incredible. To the contrary, these are rather sophisticated legal points, often escaping laymen. It would not be hard to imagine that at least a number of the Respondent's employees would become confused by the distinction between a threat to eliminate benefits and a statement of the law that wages, hours, and working conditions are subject to negotiations.

[9] The ability to take time off from work to attend a funeral in a foreign country was apparently an important matter to a significant number of employees who were originally from Mexico, and continued to have members of their extended family living in Mexico.

In any event, I conclude that Elioff and Dominguez did not threaten employees at group meetings with a loss of existing benefits if they selected the Union as their collective bargaining representative. Nor would the managers' statements, when taken in context, have reasonably conveyed to employees the impression that they would only get those existing benefits which the Union could restore. Rather, they simply explained to assembled employees the reality of the collective bargaining process and what can happen during the give and take of negotiations. Such an accurate representation does not constitute an unfair labor practice. *BI-LO*, 303 NLRB 749 (1991); and *Somerset Welding & Steel, Inc.,* 314 NLRB 829 (1994) (on remand from the Court of Appeals, District of Columbia Circuit). Accordingly, I shall recommend that complaint paragraph 7(a) and, to the extent related, paragraph 10 be dismissed.

Paragraph 7(b) of the complaint alleges that in about April or May 2002, at a group meeting, Elioff and Dominguez created the impression of surveillance of employees' union activity by telling them that the Respondent had a list of those employees who had signed union cards. Counsel for the General Counsel called a number of witnesses who testified about this "list." Bella Amara Aguirre testified that at the meetings she attended, Elioff told the employees that the Employer "had copies of all the people who had signed union cards."[10] Griselda Hernandez testified that Elioff told the employees that the Employer would be receiving "the list" of all the employees who had signed union cards. Maria Zarco testified that Elioff said the Employer "had received a letter or a sheet with the signatures of all the people who had signed for the Union." Allegedly, Zarco was concerned enough about this matter that the following day she went to see Elioff in her office. Zarco told Elioff that she had not signed a union card and wanted to know if her name was on the list that Elioff had mentioned the previous day. According to Zarco, Elioff told her not to worry and if her name appeared on the list, Elioff would compare the "signature" with the one on Zarco's employment application. Elioff allegedly indicated that it was possible that someone had placed Zarco's signature on the list, even though she had never signed it.

Both Elioff and Dominguez deny that they even told employees that the Respondent was in possession of, or would obtain, a list with the names of those employees who had signed union cards, or words to that effect. They testified that it was the employees who brought up the subject of union cards at certain group meetings. According to Elioff, during some question and answer sessions, employees mentioned that the Union was asking them to sign either a "list" or a union card, and they wanted to know if they signed one, did they have to sign the other. Elioff answered the questions by saying that, "The card and the list are one and the same. They are both legal documents." Specifically, Elioff recalled an instance where Maria Zarco came to Elioff's office with a concern that she had heard that her name was on a list of union supporters, but that she had never signed any such list. Zarco wanted to know if the Employer had given the Union any "personal information" about her. Elioff told Zarco that the Employer had certainly not given the Union any personal information about her, but that the Union had a "list" of the names of all the employees, and that some employees had complained that they were being contacted by the Union.[11] Further, Elioff said that she would not be surprised if Zarco's name

[10] Presumably, the witness meant to say, a "list" of all the people who had signed union cards.

[11] I assume that this is a reference to the *Excelsior* list, which must include the full name and address of those employees who are considered eligible to vote. The Employer is required to provide this to the Board, which in turn provides the list to the Union.

had been "forged" on some list. Elioff denies telling Zarco that she would compare her signature on her application form with the signature on some list to determine if it were forged. She testified that she would not have said such a thing, because she did not expect to receive a list with the names of the union supporters.

Counsel for the Respondent called a number of employee witnesses to testify who essentially supported the testimony of Elioff and Dominguez. Estela Moreno, Carmen Fernandez Gonzalez, and Francisco Fernandez Tarelo all testified that Elioff never mentioned anything about the Employer having a list containing the names of union supporters. Further, Moreno and Gonzalez testified that employees, "gossiping" among themselves, discussed there being a list, which the Union and the Employer had, that contained the names of union supporters.

I continue to credit the testimony of Elioff and Dominguez. Their testimony in regard to the "list" is inherently more plausible than that of those employees who claim the managers mentioned the Respondent possessing a list of union supporters. It is much more reasonable and logical to assume that the matter of a "list" was being discussed by the employees themselves, and when the question of a list was raised by employees at group meetings, Elioff and Dominguez responded simply by telling the employees that whether the Union asked them to sign a union card or a paper list, these were "legal documents." As I have indicated earlier, Elioff and Domingez impressed me with their sincerity and their ability to recall the details of events. Also, employee witnesses corroborated their testimony that there was no suggestion at any group meetings that the Respondent had a list of union supporters. Therefore, I conclude that neither Elioff nor Dominguez ever stated or implied at any group meetings that the Respondent was in possession of a list of union supporters, or words to that effect. There was no implied surveillance of employees' union activity. Accordingly, I shall recommend that complaint paragraph 7(b) and, to the extent related, paragraph 10 be dismissed.

At the hearing, counsel for the General Counsel amended paragraph 7(c) of the complaint. As amended, it is alleged that in April 2002, Sarita Dominguez threatened employees that if the Union were selected as the bargaining representative, employees without proper work documents would lose their jobs. During the time of the events in question, employees received their paychecks by picking them up every Thursday in the lunchroom from someone from the human resources department. Employee Maria Zarco testified that around the time of the election, she was in line waiting to receive her paycheck when she overheard Dominguez, who was passing out the checks, tell fellow employee "Cesar," who was ahead of her in line, that he would be "the first one out" if the Union were elected because "the Union [did] not accept people whose documents [were] not in order." Counsel for the General Counsel never called "Cesar" as a witness. In a second alleged incident, employee Jose Jesus Flores testified that he had a similar conversation with Dominguez when he was receiving his paycheck in April. According to Flores, Dominguez, who seemed upset, told him that he should "be on the lookout because all the names had already been sent out to Sacramento, and they were going to be asking us for our documents."

Dominguez credibly denied that she ever told any employees that if the Union were successful at the election that employees without proper work documentation would lose their jobs, or similar words. It appears that the Respondent employs a significant number of recent immigrants. In such a community, it would not be unusual for employees to be concerned about having proper work documents. Never the less, the two statements attributed to Dominguez make no sense. Zarco testified that she overheard Dominguez telling "Cesar" that the "Union" did not accept people whose documents were not in order. Even a very recent immigrant to this country knows that the "Union" has nothing to do with checking on immigration status, rather,

that is a concern of the Employer[12] and, of course, of the United States Immigration and Naturalization Service (INS).[13] "Cesar" would have no reason to fear the Union, even assuming his documents were not in order. As "Cesar" never testified, and as Dominguez credibly denied that she made such a statement, I am left to conclude that the alleged conversation never occurred. It is certainly highly implausible. Similarly, Flores' contention that Dominguez said that names had been sent to "Sacramento" and they were going to be asking for "documents," makes no sense. What names? Who would be asking for documents? Why Sacramento? What did the Union have to do with any of this? None of these questions are ever answered. Once again, I am of the belief that even a very recent immigrant would understand that neither the Union, nor Sacramento, the capital of California, would have any thing to do with determining whether an employee had proper documents to be employed in the United States. This conversation is equally implausible.

I credit Dominguez' denial that she ever threatened employees who supported the Union with job loss because of inadequate or improper documentation authorizing them to work in the United States. Accordingly, I shall recommend that complaint paragraph 7(c) and, to the extent related, paragraph 10 be dismissed.

As is reflected in complaint paragraph 7(d), the General Counsel alleges that in about April or May 2002, at a group meeting, Dominguez and Elioff threatened employees with plant closure if they selected the Union to represent them. In support of this allegation, counsel for the General Counsel offered the testimony of employees Maria Zarco, Bella Amara Aguirre, Miguel Bugarin, and Jose Jesus Flores. According to Zarco, at a group meeting in early April, Dominguez said, "if the Union came in, it was possible that they would close one line, the Company, even if the Union didn't want that." Former employee Aguirre testified that at one of the five or six meetings she attended from April through July, Elioff stated that, "when the Union came in, if they did not agree with a contract or with something, they could close the factory …." Burgarin testified that at a meeting in June, Elioff told a group of employees that, "If the Union came in the Company could close the plant … that if they wanted to they could close it." Finally, according to former employee Flores, he attended a number of group meetings during April and May, at one of which Elioff said regarding the election, "To think about it well, because the Company could close some of the lines …."

As with other allegations, the Respondent offered evidence to show that the General Counsel's witnesses were confused and did not accurate testify about what the managers said. According to Elioff, the issue of the plant closing had been raised by employees who informed management that union organizers were saying that unless the Union was selected as bargaining agent, the facility would close. Elioff testified she told the employees "we had absolutely no plans to close the Vernon Bakery and that [the rumor] was a lie." She emphatically denied that either she or Dominguez ever threatened to close the plant if the Union were successful. Domingez also denied that any such statements were made. Their denials are supported by the copies of the written scripts prepared prior to the group meetings (Res. Exh. 8 & 11.), as well as the testimony of employee witnesses Estela Moreno and Carmen Fernandez Gonzalez. Moreno testified that "people outside of the Company" were "gossiping" that the plant was going to close, and that the employees asked management about it.

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[12] The undersigned takes administrative notice that under the Immigration Reform and Control Act of 1986, an employer, by reviewing documentation, must verify the identity, and employment eligibility status, of any person hired by that employer.

[13] On March 1, 2003, the INS officially became the Bureau of Citizenship and Immigration Services.

However, according to Moreno, Elioff told the employees "there is no plan of closing the Company." Similarly, Gonzalez testified that she heard discussions about the plant closing "from the people who were for the Union." According to Gonzalez, Elioff responded to questions about the plant being closed with the statement that, "it would not be closed."

Further, the witnesses called by counsel for the General Counsel did not hold up well on cross-examination. Jose Jesus Flores was forced to admit that while there were rumors going around the plant that the Company was going to close lines, management denied that there were any plans to close lines.[14] Miguel Bugarin contradicted himself a number of times on cross-examination, but ultimately indicated that Elioff said that after the Union "came in" the plant could close if it was "not making money." Maria Zarco testified that Dominguez said that after the Union "came in," it was "possible" that the Employer would close one line.[15]

In any event, I am convinced that the weight of the credible evidence strongly supports the denials offered by Elioff and Dominguez. I continue to credit them for the reasons expressed earlier, and believe that any references made by them to the closing of the plant or of individual lines were given in the context of denying rumors that had been disseminated among the employees themselves. Their testimony was more inherently plausible than not, and was supported by the testimony of other witnesses. I do not believe that they threatened to close the plant or individual lines if the employees selected the Union to represent them. Accordingly, I shall recommend that complaint paragraph 7(d) and, to the extent related, paragraph 10 be dismissed.

As amended at the hearing, the General Counsel alleges in complaint paragraph 7(e) that from May through June 2002, at group meetings, Elioff and Daniel Mani promised employees new and/or enhanced benefits to induce them to abandon their support for the Union. Specifically, those benefits are listed as a gainsharing bonus, new company-provided uniforms, an additional paid holiday, improved medical benefits, and increased life insurance benefits. Prior to considering the parties evidence regarding this allegation, it is necessary to set forth certain background information. It is undisputed that in August 2001, Sara Lee acquired the Earthgrains Company, and combined their respective bakeries into the Sara Lee Bakery Group. According to the unrebutted testimony of Elioff, discussions started in November of 2001 about changing the benefits provided to employees at the Vernon facility, as well as other facilities, so as to establish a uniform benefit package following the acquisition. The Respondent then began a review of its employee provided benefit package. Elioff testified that management distributed to all its employees at the Vernon facility a memorandum dated February 5, 2002. This memo was addressed to all employees at three of the Respondent's facilities, including Vernon, and informed them that as a result of the acquisition of Earthgrains, the Respondent was conducting a review of "the compensation and benefit plans provided to employees." Further, the memo stated that, "As soon as we complete our review, we will provide you with the details of any changes that may occur." (Res. Exh. 5.) Employee witness Estela Moreno testified that she recalled receiving this memo about February 5, 2002, the date it bears, which was approximately two and a half months prior to the filing of the representation petition, and before the start of the organizing campaign.

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[14] Employees commonly refer to the Respondent's various products as "lines," such as the pound cake line or the French bread line. Employees are apparently assigned to work on one or more specific "lines."

[15] Even assuming these statements were made as alleged by Bulgarin and Zarco, in the context given, they do not constitute threats of reprisals for union support. *Sangamo Western, Inc.,* 273 NLRB 256 (1984); and *Cassone Bakery*, 247 NLRB 220, 221-222 (1980).

The Respondent continued with its efforts to review its employees' benefits, as can be seen in what is apparently an internal document entitled "Sara Lee Fresh Benefits Review" and dated February 19, 2002. Among the proposals set forth in this document were significant improvements in employee medical, life insurance, and retirement plans. (Res. Exh. 15.) Elioff testified that approximately one month later, she was party to e-mail communications which further set forth the benefit changes that the Respondent had now decided to award to its employees, which communications suggested the employees could be notified of the changes the week of March 18. The communications specifically indicated that certain of the improvements in the life insurance and medical insurance plans would begin effective May 1, 2002. (Res. Exh. 14.)[16] While the record evidence is unclear as to why the changes were ultimately delayed, it is undisputed that at employee meetings on or about May 29, Mani, Elioff, and other managers informed employees of the changes.

A number of employee witnesses testified on behalf of the General Counsel and alleged that the benefit changes were explained in terms that linked them to the employees' rejecting the Union as their collective bargaining representative. These employees included Bugarin, Aguirre, Zarco, and Flores. Elioff denied that there was any mention by management at these meetings of the increased benefits being conditioned on a Union defeat. Once again, I must decide which version to believe. As I have continually done, I believe that Elioff's testimony is credible, and more inherently plausible than that of the employee witnesses. Also, the documentary evidence supports her testimony. Clearly, the Respondent had been considering for some time, well before the organizing campaign, an increase in the medical and life insurance plans, and an enhanced retirement program. The Respondent's managers had discussed these changes internally, plus the employees had been alerted in writing on February 5 that changes and improvements were coming. I am of the view that the employees who testified that the changes were linked to a defeat of the Union in the election were simply confused, or were making unwarranted assumptions. I credit Elioff's testimony.

The Board has traditionally held that an employer does not violate the Act by promising or granting a benefit during an election campaign, as long as the employer can demonstrate that the benefit or increase was planned and decided upon prior to the commencement of any union activity. *Capitol EMI Music, Inc.,* 311 NLRB 997, 1012 (1993); and *Noah's Bay Area Bagels, LLC,* 331 NLRB 188, 189 (2000). In this case, I conclude that increased life insurance benefits, improved medical benefits, and an enhanced retirement program were considered and essentially decided upon prior to the commencement of any union activity. (Res. Exh. 5 & 15.) Further, employees had been aware for some time, since February 5, that management was reviewing their benefits with the aim of making improvements. Therefore, I conclude that the Respondent's announcement on about May 29, of improvements in medical benefits, increased life insurance benefits, and an enhanced retirement program did not violate the Act.

However, it does appear that certain other improved benefits announced to groups of employees on or about May 29 did constitute changes intended to induce them to abandon their support for the Union. The Respondent used an "overhead presentation" to present employees with the changes they were to receive. (Res. Exh. 16.) Several of the items displayed by the overhead had, as far as I can determine, never before been presented to the employees, nor were these matters considered in any detail prior to the Union's organizing campaign. These

[16] Respondent's exhibit 14 consists of two e-mail messages, dated March 15 and 18, 2002, respectively. Elioff's name appears on the upper left hand corner of the two documents, indicating that she was e-mailed copies of the two communications.

matters included a "gainsharing" or bonus plan, which could significantly increase an employee's pay.[17] Also, according to the overhead, employees would "now get eight (8) paid holidays during the year," a listing of those holidays then followed. While I am unclear as to how many additional paid holidays this constituted for the employees, a number of the employee witnesses, including Aguirre and Flores, testified that there was at least one more paid holiday being provided. The Respondent's witnesses did not specifically deny the additional paid holiday allegation.

It is well established that the granting or promising of benefits during the pendency of an election petition is *prima facie* evidence of intentional interference with employee's Section 7 rights and is presumed to be for the illegal object of influencing employees. *Lampi, LLC,* 322 NLRB 502, 502 (1996); see also *United Airlines Serv. Corp.,* 290 NLRB 954, 954 (1988) ("The critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect.") In *NLRB v. Exchange Parts Co.,* 375 US 405 (1964), the Supreme Court stated: "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

In my view, the Respondent has failed to offer sufficient evidence that either the gainsharing bonus or the additional paid holidays were decided on prior to the organizing campaign, or that they were part of some past practice. In fact, virtually no evidence was offered by the Respondent to rebut these allegations. They were certainly the type of benefits reasonably calculated to influence the employees' vote in the pending election. Accordingly, I am left with no alternative but to conclude that in announcing to employees the gainsharing bonus and the additional paid holidays, the Respondent was attempting to induce employees to abandon their support for the Union in violation of Section 8(a)(1) of the Act.

One additional item alleged in complaint paragraph 7(e) concerns company-provided uniforms. From the evidence presented, it appears that at the group meetings held on or about May 29 managers made references to employees being provided with lockers and uniforms. This is not in dispute. However, a number of the employee witnesses called by the General Counsel, including Bugarin, Aguirre, Zarco, and Flores, testified that prior to these meetings they were unaware that lockers or uniforms were going to be provided. They indicated that the managers linked this benefit with a rejection of the Union at the election. Elioff testified that the decision to provide employees with uniforms was made in 2001, following an outbreak of "listeria" in the meat division.[18] As employee uniforms would require lockers to house them, the Respondent also began construction of the lockers in 2001. According to Elioff, she was of the

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[17] My review of the exhibits reveals only two written references to "gainsharing" prior to the overhead presentation of May 29. In the e-mail communications dated March 15 and 18, respectively, there are mere cryptic references to "gainsharing." (Res. Exh. 14.) There is no explanation of what this entails, and no specifics regarding any amount of employee compensation. What subsequently appeared at the overhead presentation was a specific program apparently offering employees the ability to earn 8% addition income per quarter.

[18] According to Elioff, listeria is caused by an "organism" growing in meat, or other food products, which has the potential to be fatal when spread to people through ingesting the contaminated food.

belief that employees at the Vernon facility had been aware of the locker construction, and its intended purpose to house the uniforms, for some period of time prior to the organizing campaign. Further, she denies that anything was said at the meetings to link this benefit with the pending election.

On cross-examination, former employee Flores was forced to admit that he had known for some time that lockers were being constructed specifically to keep employee uniforms. While he was reluctant to admit it, he appeared to acknowledge that he knew of the locker construction before the Respondent's managers made the announcement at the group meeting. Employee witness Estela Moreno, who was called by counsel for the Respondent, testified that she had heard about the uniforms and lockers approximately six months prior to the meeting with Daniel Mani. Further, she testified that the lockers had been under construction for some time prior to the meeting. Also, on cross-examination, employee witness Carmen Fernandez Gonzalez, who was called to testify by the Respondent, stated that a few months prior to the meeting with Mani, she had heard from coworkers that lockers had been constructed for the employees and that the Employer was going to provide them with uniforms.

I am of the view that the weight of the credible evidence supports the Respondent's position that prior to the organizing campaign, the Respondent had made the decision to provide employees at the Vernon facility with uniforms and lockers to store them. Further, the evidence establishes that the lockers had been under construction for some time prior to the meeting on May 29, and that employees were aware of the construction and its purpose. I base my conclusion on the credible testimony of Elioff, which is supported by the testimony of employees Flores, Moreno, and Gonzalez. Therefore, I conclude that the Respondent's announcement on May 29 that it would be providing employees with uniforms and lockers did not violate the Act, as employees had been aware for some time prior to the union campaign that management would be doing so. *Capitol EMI Music, Inc., supra; Noah's Bay Area Bagels, LLC, supra.*

In summary, regarding complaint paragraph 7(e), I have concluded that the Respondent violated Section 8(a)(1) of the Act when its supervisors and agents informed employees that it would be providing them with a gainsharing bonus and additional paid holidays as an inducement to them to abandon their support for the Union. I shall recommend that the remainder of this paragraph regarding company–provided uniforms, improved medical benefits, and increased life insurance benefits and, to the extent related, paragraph 10 be dismissed.

It is alleged in complaint paragraph 7(f) that in June 2002, at a group meeting, Elioff told employees that if they selected the Union to represent them, a strike would be inevitable. In support of this allegation, counsel for the General Counsel called a number of employee witnesses to testify. Jose Jesus Flores testified that Elioff told the employees that "the Company could at any time go out on strike" and, that if employees didn't participate, "the Union would fine [them.]" Bella Amara Aguirre testified that Elioff made similar comments including, "when the Union came in, there were going to be strikes, and that we all had to attend the strikes." Further, Aguirre alleges that Elioff informed the employees that they would not be able to "return to work" during a strike and, if they did so, the Union would "fine" them. According to Griselda Hernandez, Elioff said, "Every time the Union came into a company, they went out on strike." Miguel Bugarin contends that Elioff told the employees that, "if people would go out on strike that the Company could replace them with other workers."

Elioff and Dominguez denied telling employees that it they voted for the Union a strike would be inevitable. Rather, Elioff testified that she informed employees that a strike was always a possibility with a union, and the only way to guarantee that a strike did not happen was

to remain non-union. She acknowledged discussing with the employees at some length the nation-wide strike that the Union called against Earthgrains in 2000. Counsel for the Respondent called a number of employee witness to testify who supported the testimony of Elioff and Dominguez, and specifically that Elioff never said that a strike would be inevitable. These witnesses included Estela Moreno, Carmen Fernandez Gonzalez, and Luis Salgado.

Once again, I must decide which of the conflicting versions of the discussions at the group meetings is the most accurate. As I have throughout this decision, I continue to believe that the testimony of Elioff and Dominguez was essentially correct. I believe that it is more likely than not that what the managers did at these meetings was to explain that if the parties did not agree on the terms of a contract during negotiations, that the Union could possibly call a strike. In that event, employees would have to consider whether to cross the picket line or not. The consequences of that decision were then explained to the employees. Also, examples were provided of strikes that the Union had been involved with in the past, with specific emphasis on the strike at Earthgains two years earlier. This testimony by Elioff and Dominguez was inherently plausible. Also, it was supported by the testimony of those witnesses called by the Respondent, as well as by certain campaign literature distributed to employees by the Respondent. (Res. Exh. 17.)

This is not to suggest that the witnesses called by the General Counsel were deliberately fabricating their testimony. Whether a strike may possibly occur and its potential consequences are hypothetical concepts, which are difficult to grasp. It is not surprising that some of the employees got confused regarding the managers' statements and have apparently recalled many of the statements out of their context. In any event, I credit the testimony of Elioff and Dominguez that they never threatened employees that if they voted for the union a strike would be inevitable.

The Board has held that statements identifying the possibility and ramifications of a strike are not illegal threats. *Nouveau Elevator Indus., Inc.,* 329 NLRB 120 (1999); and *Liquitane Corp.,* 298 NLRB 292 (1990). Also, explaining in a handbill that contract negotiations can become protracted and bitter, which could lead to strikes, has been found not to violate the Act. *General Electric Co.,* 332 NLRB No. 91 (2000); see also *Coble Dairy Products Cooperative, Inc.,* 205 NLRB 160, 165 (1973) (where in an objections case it was held not to be a violation of the Act for the employer to tell employees that if the union were successful in the election, "usually it would cause strikes"). Accordingly, I shall recommend that complaint paragraph 7(f) and, to the extent related, paragraph 10 be dismissed.

Complaint paragraph 7(g) alleges that in early June 2002, Elioff told an employee that a strike was the inevitable consequence of unionization. However, counsel for the General Counsel offered no evidence to support this allegation. Neither did she move to withdraw this allegation. Instead, in her post-hearing brief, counsel raises for the first time the contention that in July 2002, not Elioff, but Dominguez allegedly threatened employee Maria Zarco and her husband with losing their jobs if the Union were successful in the organizing campaign. Zarco testified that Dominguez told her "not to be an idiot, not to be a fool, to remember that there were two checks coming to [her] house and that if the Union came in, [she] was going to lose them, because the Union was too strict." According to Zarco, Dominguez was making reference to the Union's propensity to strike, which could result in her and her husband, who was also employed by the Respondent, losing their jobs. Counsel for the General Counsel acknowledges that there is no complaint allegation regarding this purported conversation between Dominguez and Zarco. However, she argues that a violation of the Act should still be found as allegedly the incident is closely related to the subject matter of the complaint and was fully litigated. *Hi-Tech Cable Corp.,* 318 NLRB 280 (1995).

I do not agree with counsel for the General Counsel's contention that this alleged incident was fully litigated. While Dominguez testified, she was never asked about the alleged conversation. This is not surprising in view of fact that the reference was rather brief, cryptic, and "hidden" in hours of testimony by many employee witnesses as to what Elioff and Dominguez did or did not say at numerous meetings. Under these circumstances, I believe it inappropriate to draw an adverse inference from Dominguez' failure to specifically deny the allegation. Had counsel for the General Counsel wished to allege this purported conversation as a violation of the Act, she should have amended paragraph 7(g) of the complaint to reflect the incident to which Zarco made reference. She failed to do so. Nor did she notify counsel for the Respondent and the undersigned that she was raising this issue as a possible violation of the Act. Due process required that, under the particular circumstances of this case, counsel for the Respondent be placed on notice of the General Counsel's contention, so that he could have had the opportunity to offer rebutting evidence. In my view, the existing complaint paragraph, which names Elioff as the offending supervisor who is alleged to have told an employee that "a strike was the inevitable consequence of unionization," is too distinct for a connection to be naturally made with the purported conversation between Dominguez and Zarco.

As I conclude that the alleged conversation between Zarco and Dominguez has not been fully litigated, I will not find this purported conversation, which is not alleged in the complaint, to constitute a violation of the Act. Further, as no evidence was offered at the hearing to support the allegation in complaint paragraph 7(g), I shall recommend the dismissal of that paragraph and, to the extent related, paragraph 10.

3. The Suspension and Discharge of Guadalupe Ortiz

It is alleged in complaint paragraph 6(a) and (b) that the Respondent suspended and then discharged its employee Guadalupe Ortiz because of his union activity and because he gave testimony under the Act. Ortiz began working for the Respondent on May 16, 1991. He was suspended on April 26, 2002, and discharged in mid-May. At the time of his suspension and termination, he held the position of lead person in packing on the pound cake line.[19] The Respondent took the position at the hearing that Ortiz was a supervisor as defined in Section 2(11) of the Act and, thus, not covered under the protection of the Act. However, in his post-hearing brief, counsel for the Respondent indicated that, "because the evidence is so compelling on the cause for discharge, we will not address this argument [the supervisory issue] at length in this brief." Having taken this course, the Respondent's supervisory argument must rise or fall solely on the basis of the witness testimony.

It is the Respondent's burden to establish that Ortiz was a supervisor within the meaning of the Act The Board has long held that the burden of establishing that an individual is a statutory supervisor is to be borne by the party asserting such status. The Supreme Court approved the Board's evidentiary allocation in its paramount decision on the subject of supervisory status in *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710-712 (2001). I am of the view that the Respondent has failed to meet its burden.

It is well established that the supervisory functions enumerated in Section 2(11) of the Act are to be read in the disjunctive, and the existence of any of them, regardless of the frequency of their performance is sufficient to confer supervisory status. *NLRB v. Yeshiva*

[19] While the Respondent takes the position that Ortiz' title was that of senior lead person, in view of my ultimate disposition of this matter, his precise job title is of no significance.

Univ., 444 U.S. 672 (1980); *Queen Mary*, 317 NLRB 1303 (1995); and *Allen Servs. Co*., 314 NLRB 1060 (1994). However, in my opinion, Ortiz did not independently exercise any of the indicia of supervisory authority listed in Section 2(11). He certainly had no authority to hire, fire, discipline, promote or reward employees. In reality, he was simply a working leadman or foreman whose unrebutted testimony established that his principal duties included "checking the metal machine every 15 minutes, to check on the bread every 5 minutes for the correct date, to check on the oxygen machine … and to pull the production to the shipping department." His immediate supervisor was Rafael Arteaga. The weight of the credible evidence establishes that any assignment of duties, or decisions to have employees take their breaks or lunch were merely routine in nature, usually dictated by a pause in the production line or some other disruption. For anything other than a routine matter, Ortiz had to confer with and get permission from Arteaga. While certain employees testified that they viewed Ortiz as being in charge of the line when Arteaga was absent, the credible evidence establishes that Ortiz was required to clear any decision or action not routine in nature with Arteaga either before Arteaga left or after he returned. Ortiz did not attend the biweekly supervisor meetings, and there appears no reasonable basis why any of the other employees should have viewed him as their supervisor. Accordingly, I conclude that as a working leadman Ortiz was an employee as defined in the Act and entitled to the protection of the Act.

Ortiz' union activity was extensive. In March 2002 he contacted the Union about attempting to organize the Respondent's employees. Thereafter, he was open and vocal about his support for the Union. He apparently made no effort to hide his union activity from the Respondent's managers. He testified that in April he spoke with about 20 to 30 employees about the Union and asked some of them to sign union cards and attend union meetings. The Respondent does not deny knowledge of Ortiz' union activity. However, it is the position of the Respondent that the decision to suspend and ultimately to discharge Ortiz was based solely on his misconduct toward fellow employees, as reported by those employees, and not on any union activity he may have engaged in, or his cooperation with the Board.

Sara Dominguez testified that on April 26, 2002, three employees reported to her that Ortiz had threatened them with harm if they did not support the union organizing effort. The first employee to complain was Juana Lopez. According to the testimony of Dominguez, Lopez told her that Ortiz had been "throwing indirect messages toward [her]" that he was going to "kill that old woman" who reported his union activity to the office. Dominguez testified that Lopez believed Ortiz was talking about her, even though Lopez indicated that she was not the person who had complained about Ortiz. Later that day, employee Maria Gomez' daughter called Dominguez to inform her that Ortiz was giving Gomez a hard time at work because she did not support the Union. Gomez then called Dominguez and told her that Ortiz threatened that he would "put her in a hard job," or that she would lose her job if she did not support the Union. The third employee to contact Dominguez that day was Victoria Martinez. According to Dominguez, Martinez came into her office screaming and yelling in Spanish. Martinez asked, "Do you know what is going on out there?" Further, she said, "They are going to chop me up in pieces and you are allowing this. They are going to shoot me and they said they are going to ruin my car. You are allowing Lupio[20] to go out there and say that, and do that to us?"

According to Dominguez, after the third employee complained to her, she decided to consult with Irma Elioff. Apparently, Dominguez explained to Elioff what had transpired and what the employees had to say. Dominguez told Elioff that, "This is getting out of hand. This is getting crazy. Let me just go talk to Lupio, and maybe we can stop it." She testified that she

[20] A number of witnesses testified that Guadalupe Ortiz was known in the facility as "Lupio."

found Ortiz on the production floor and told him that several employees had complained that he had threatened to harm them. She said, "Lupio, what are you doing? The women are scared. What are you telling them? The women are saying you are going to kill them. What is going on?" Dominguez testified that Ortiz responded by saying several times, "You can not prove nothing." She told him, "Lupio, I am not here to argue with you. Just do whatever you are doing, but do not be scaring the ladies." He started screaming at her, "Prove it. Prove it." She said, "Do you know what? You and I have been friends for years. I am not going to deal with this. I am going back to my office." From that point on, she essentially let Elioff handle the matter without her involvement.

As noted earlier, I find Dominguez to be a credible witness. When testifying about this incident, she became somewhat emotional, and her eyes clouded with tears. I believe that her emotions were genuine, without any hint of theatrics or histrionics. The incident obviously upset her, apparently both because she and Ortiz had been friends, and because she felt that he had been threatening to harm the three female employees. After observing her demeanor, I am convinced that Dominguez testified in an accurate and credible manner concerning her conversations with the three female employees and with Ortiz. Further, I am of the view that she has not exaggerated or embellished these events. The complaining employees were apparently highly agitated and very frightened and upset with what they perceived as Ortiz' threats to harm them unless they support the Union's organizing efforts. Dominguez communicated their concerns to Ortiz, and was met with hostility and denials.

Irma Elioff testified that while in her office on April 26, she observed several employees talking with Dominguez. Thereafter, Dominguez explained to her that the employees had reported that Ortiz had threatened them. Elioff contacted the corporate human resources department in St. Louis, and was instructed to suspend Ortiz pending an investigation. She then called Ortiz into her office, and informed him that he was being suspended because of allegations from several employees that he had threatened them.

Juana Lopez testified that after she reported the threat by Ortiz, she provided the Respondent with a written statement of the incident. (Res. Exh. 3.)[21] Maria Gomez also signed a written statement following her report of the incident to Dominguez. (Res. Exh. 21.)[22] The third employee involved in the incident, Victoria Martinez signed a written statement prepared for her by a human relations assistant. (Res. Exh. 20.)[23] Martinez' statement does not specifically name Ortiz as the individual who threatened her. However, both Elioff and Dominguez credibly testified that Martinez orally named Ortiz specifically as the person who threatened her. According to Elioff, Martinez would not formally name Ortiz because she was "scared to death" and "feared for her life" that Ortiz would cause her harm. Following Ortez' suspension, Elioff became aware of a fourth employee, Maria del Carmen Estrada, who contented that Ortez had also threatened her. Estrada told Elioff that Ortiz in a threatening tone

[21] While this statement is written in the Spanish language, it was translated into English at the hearing by the Spanish language interpreter.

[22] At the time of the hearing, Maria Gomez was reported to be in Mexico and unavailable to testify. In any event, her written report of the incident was admitted into evidence. Although written in the Spanish language, it was translated into English at the hearing by the Spanish language interpreter.

[23] Again, this is a Spanish language document, which was translated into English at the hearing by the Spanish language interpreter.

had told her that he knew where she lived, and if she did not support the Union that something would happen to her or her family. She subsequently had prepared, signed, and presented to Elioff a written statement in which she set forth the details of this incident, indicating that it had occurred on April 26. (Res. Exh. 4.)

Following her review of the four written statements and her interviews with the involved employees, Elioff decided to terminate Ortiz. She admitted that she never contacted Ortiz to obtain his side of the story, nor did she review his personnel file. According to Elioff, she had occasion in the past to caution Ortiz about complaints she had received from fellow employees that he was abusing them and being a "bully." She viewed him as "not an ideal employee." However, she admitted on cross-examination that she had not made any note of these alleged employee complaints in Ortiz' personnel file. Never the less, she decided that as four female employees had made very emotional appeals to the Employer to protect them from Ortiz, that the best course of action was to terminate him. Elioff had personally observed the fear in the female employees when she interviewed them, and she was convinced that it was genuine.

It is important to note that in the period between his suspension and termination, Ortiz continued with his union activity. His unrebutted testimony was that he continued to visit employees at their homes and invite them to union meetings. Of particular importance, Ortiz testified on behalf of the Union at the representation hearing held on May 6, 2002.

Ortiz was discharged effective May 14. Elioff contacted Ortiz at his home by telephone and informed him of the decision. While she did not specifically give Ortiz a reason for the termination in their phone conversation, the written termination notice issued to Ortiz specifically lists "Discharged for Cause" as the reason for the termination. (G.C. Exh.7.) Elioff testified that the decision to discharge Ortiz, which decision she made, was totally unrelated to any activity on behalf of the Union that he was engaged in, or because he had testified at the Board representation hearing.

Ortiz testified at length. He specifically denied that he had in any way threatened any employees, including Juana Lopez, Maria Gomez, Victoria Martinez, and Maria del Carmen Estrada for any reason, including an attempt to have them sign union cards, sign a union list, or generally support the Union. For each instance, he testified specifically why the incident did not occur as alleged. Employees Maria Del Carmen Estrada and Juana Lopez were called and testified as witnesses on behalf to the Respondent. They testified about threats that Ortiz had made to them, similar to those that Dominguez had testified about. However, their testimony was somewhat confusing, especially that of Estrada. In fact, Estrada's testimony was so confusing, that at times it was incomprehensible. Never the less, I got the sense that both women were attempting to testify honestly. Any confusion was, in my opinion, a product of limited education, and perhaps the loss of some continuity because of the translation from Spanish into English and vice versa, rather than any intentional effort to mislead.

Regarding Ortiz, I did not find him generally to be a credible witness. He seemed to have "an attitude." On cross-examination he was less than helpful and frequently answered counsel for the Respondent's questions with, "I don't recall." However, his memory was much better on direct examination where he was able to present his case in the best possible light. I had the sense that he was exaggerating and embellishing his testimony to portray himself inaccurately as an "innocent victim." His denials of any threats, explicit or implied, to "convince" employees to support the Union seemed contrived and less than credible. I found these denials inherently implausible, especially when compared to the testimony of the witnesses on behalf of the Respondent. His testimony did not "ring true."

As I indicated earlier, I find Elioff and Dominguez to be credible witnesses. I believe that they accurately testified about their conversations with the four female employees who complained that Ortiz was threatening them in an effort to coerce them into supporting the Union. In fact, for purposes of resolving this issue, the weight of the credible evidence certainly supports the complaining employees and not Ortiz. The collective evidence, including the testimony of Juana Lopez and Maria del Carmen Estrada, and the four employees' written statements, constitutes strong evidence that they were telling the truth about the alleged threats. Certainly, Dominguez and Elioff believed that the complaints were genuine, and that the four employees were fearful that Ortiz was going to do them some harm. There was no reason for them to doubt these complaints. No one has suggested that Maria Del Carmen Estrada, Juana Lopez, Maria Gomez, and Victoria Martinez were engaged in some kind to a "conspiracy" to get Ortiz fired. There was certainly no evidence of this, and no logical reason to believe it. Based on the allegations that the four employees were making against Ortiz, Elioff and Dominguez had every reason to believe that he had made the threats. I conclude that was precisely what they believed.

In *Wright Line, A Division of Wright Line, Inc*., 251 NLRB 1083 (1980), enf'd. 662 F2d. 899 (1st Cir. 1981), cert denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB vs. Transportation Corp*., 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a *prima facie* showing that Guadalupe Ortiz' protected conduct was a motivating factor in the Respondent's decision to suspend and ultimately terminate him. In *Tracker Marine, L.L.C*., 337 NLRB No. 94 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place, even in the absence of the protected conduct. See also *Mano Electric, Inc*., 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros. Co*., 303 NLRB 638, 649 (1991).

There is no doubt that Ortiz engaged in substantial protected conduct. His union activity included initially contacting the Union to determine whether it was interested in organizing the Respondent's facility. Once the union campaign began, Ortiz continued with his union activity by talking with numerous employees about the Union at work and at their homes, and by distributing and collecting union cards. Following his suspension, Ortiz continued to be active in the campaign, and his protected conduct included testifying at the Board representation hearing.

It is equally clear that the Respondent was aware of Ortiz' protected conduct. Ortiz was open and vocal about his support for the Union. He made no effort to keep his union activity a secret from the Respondent's managers. Obviously, Elioff and Dominguez knew on April 26 that Ortiz was soliciting employees to sign union cards, or a petition, because three of the complaining female employees told them so. The union started to organize the facility in March, and the Respondent began to hold employee meetings even before the representation petition was filed on April 18. Ortiz' union activity was so extensive, it could not have escaped management's attention. Under these circumstances, it is logical to assume that the Respondent's managers had been aware of Ortiz' union activity for some time prior to his suspension. It is equally logical to assume that they knew of his continuing union activity between his suspension and his termination on May 15. They obviously knew that he testified on behalf of the Union at the Board representation hearing, which occurred on May 6. Further, as noted above, the Respondent does not deny knowledge of Ortiz' protected conduct.

Certainly, Ortiz suffered adverse employment actions. He was suspended and subsequently fired by the Respondent. It should be noted that the Respondent had employed Ortiz at the facility for a significant period of time, since May 1991.

Regarding the question of whether there exists a link or nexus between Ortiz' protected conduct and his suspension and termination, while the evidence is limited, I conclude that the General Counsel has established such a connection. The Respondent mounted a vigorous campaign to oppose the Union's organizing efforts. There were approximately 80 captive audience meetings held by the Respondent's managers. Of course, there is nothing unlawful about an employer vigorously opposing a union's organizing effort. The Act protects an employer's free speech rights under Section 8(c), so long as the employer's conduct does not interfere with, restrain or coerce its employees in the exercise of their Section 7 rights. However, I have found that during the campaign, the Respondent did violate Section 8(a)(1) of the Act by promising employees at group meetings new and/or enhanced benefits in order to induce the employees to abandon their support for the Union. Specifically, these benefits entailed the creation of a gainsharing bonus, and the granting of at least one additional paid holiday. By promising these new and/or enhanced benefits, I concluded that the Respondent was interfering with, restraining and coercing its employees in the exercise of their Section 7 rights. Such conduct constitutes *prima facie* evidence of anti-union animus on the part of the Respondent.

Based on all the above, I believe that the General Counsel has met his burden of establishing that the Respondent's actions in suspending and ultimately terminating Ortiz were motivated, at least in part, by anti-union considerations. Further, it is logical to assume that the Respondent would have viewed Ortiz' participation in the Board representation hearing as a continuing effort on his part to assist in the Union's organizing campaign. Having already demonstrated union animus, it must be assumed that the Respondent's decision to terminate Ortiz was also motivated, at least in part, on the fact that he had given testimony under the Act at the representation hearing.

The burden now shifts to the Respondent to show that it would have taken the same action, absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); and *Regal Recycling, Inc*., 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc*., 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

Irma Elioff had made an initial telephone report to the Respondent's human resources department on April 26, in which she indicated that Ortiz was being accused by at least three female employees of threatening them with physical harm or job loss. She was advised to immediately suspend Ortiz, and to conduct an investigation as to the specifics of the complaints. That is what she did. As I indicated above, both Dominguez and Elioff met with the complaining female employees, ultimately four, and reviewed their written statements. Dominguez had already confronted Ortiz on April 26 with the allegations, and been told by him, "You cannot prove nothing. Prove it. Prove it." Presumably, Dominguez informed Elioff of what had transpired. Elioff ultimately made the decision to fire Ortiz.

As I have stated earlier, Dominguez and Elioff credible testified that they believed the four female employees' complaints that Ortiz was threatening to harm them were genuine. While Elioff acknowledges that she never asked Ortiz for his side of the store, she already knew that he had challenged Dominguez to "prove" the allegations. In fact, she could be fairly confident that Ortiz would deny that he had threatened the complaining employees. Elioff was faced with the situation where four female employees, who were highly agitated and frightened, were making what appeared to be genuine complaints that a male employee was threatening them with either physical harm or job loss. If the complaints were true, and Elioff had no reason to doubt them, then Ortiz' conduct toward the four employees was certainly egregious.

Of course, Elioff's "good faith" belief that Ortiz was threatening the four employees in order to obtain their support for the Union does not constitute a defense, if in fact Ortiz did not engage in the alleged misconduct. See *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21, 23 (1964). However, as I have indicated, the weight of the credible evidence strongly suggests that Ortiz did in fact engage in the threatening conduct of which he was accused. Further, the burden of going forward and showing that the misconduct did not occur rests with the General Counsel. This burden has not been met. Also, threats of violence or of job loss, such as those allegedly made by Ortiz, remove an employee from the protection of the Act. *Chicago Metallic Corp*., 273 NLRB 1677 (1985); *Classe Ribbon Co*., 227 NLRB 406 (1976); and *Continental Woven Label Co*., 160 NLRB 1430 (1966).

In any event, from Elioff's perspective, removing Ortiz from the facility was a legitimate business decision. I am convinced that the Respondent would have suspended and subsequently terminated Ortiz, because it believed Ortiz had threatened four employees with harm, even in the absence of Ortiz' protected activity. *Yokohama Tire Corp*., 303 NLRB 337, 338 (1991). The Respondent has persuasively established by a preponderance of the evidence that it would have made the same decision to suspend and terminate Ortiz, even without any protected activity. T & J Trucking Co., 316 NLRB 771 (1995).

In summary, I find and conclude that counsel for the General Counsel has established a *prima facie* case that protected conduct was a "motivating factor" in the Respondent's decision to suspend and subsequently terminate Ortiz. However, I further find that the Respondent has established by a preponderance of the evidence that it would have made the same decision to discipline Ortiz, even in the absence of his union and other protected activity. Accordingly, I shall recommend that complaint paragraphs 6(a), (b), and (e) and, to the extent that they relate to them, paragraphs 8 and 9 be dismissed.

4. The Discharge of Macario Robledo

Paragraph 6(c) of the complaint alleges that in early October 2002, the Respondent laid off or discharged its employee Macario Robledo because of his union activity. It is the position of the Respondent that Robledo was laid off because of a legitimate economic reduction in

force. Robledo began working for the Respondent on May 18, 1988. His last day of employment for the Respondent was October 3, 2002. Robledo testified that at the time of his termination, he was "in charge of the shipping department." However, according to the Respondent's "Shipping and Receiving" department chain of command (G.C. Exh. 6.) and record of "Terminated Employees" (Jt. Exh. 3.), he was actually classified as a "senior lead person" in shipping and receiving. At the time Robledo was last employed, the Respondent's internal chain of command document (G.C. Exh. 6.) also lists Leopoldo Meza as a "senior lead person" in shipping and receiving, Rigoberto Arteaga as shipping and receiving manager, and Juan Manuel Arteaga as evening manager in shipping and receiving.[24]

Robledo testified that he learned about the Union's organizing campaign at the Respondent's facility in about May of 2002, and decided to support the effort. He began to talk in support of the Union with fellow employees, and passed out union flyers to employees for about 30 days. He testified that he distributed these flyers to employees in the "parking lot" during his lunchtime and while on breaks, and estimated that he passed out approximately 200 flyers. Further, Robledo testified that he was the designated union observer during the representation election, which was conducted by the Board at the Respondent's facility.[25] According to Robledo, on October 3, he was called into Irma Elioff's office and informed that, "the Company was going to turn the lead persons into supervisors." Further, Elioff explained to him that "in the shipping department there could not be three supervisors, there could only be two." He was told that the Arteaga brothers would remain as supervisors and he was to be "laid off."[26]

Testifying on behalf of the Respondent was Erika Croy, the facility plant manager. She testified that she has been at the facility since September 2002, and has overall responsibility for the operation of the facility. She ultimately made the decision to lay off Robledo.[27] She was not at the facility during the organizing campaign, arriving after the representation election. Croy testified that she had no knowledge of which employees had supported the Union's organizing effort. According to Croy, when she arrived at the facility, the plant was in an extremely difficult financial situation. She was directed to reduce costs, and a reduction in force was one method decided upon. As part of that plan, Croy reduced the number of temporary employees employed at the facility from 72 to 2. Additionally, a number of regular full time employees were eliminated from the facility, including from the sanitation, maintenance, shipping, and administration departments. Some employees from these departments were laid off, while others were transferred to different departments.

According to Croy, she determined that in the shipping department there were more supervisory personnel than necessary. She indicated that there were three supervisors in the department, and named Robledo and the two Arteaga brothers. Further, Croy mentioned Leopoldo Meza, who she classified as a senior lead, but contended that Meza "was really more of a working lead," having only recently been promoted. On the other hand, she testified that

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[24] Rigoberto Arteaga and Juan Manuel Arteaga are brothers.

[25] The election was conducted over the course of two days on Tuesday, July 9, and Wednesday, July 10.

[26] The Respondent did not allege that Robledo was as a supervisor and, thus, unprotected by the Act. In any event, there is no evidence to indicate that he exercised any indicia of supervisory authority.

[27] While the complaint does not allege Croy as a supervisor or agent, the record evidence clearly establishes that she is a supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act, and I so find.

Robledo's role "was more along the lines of what the other two supervisors in that department were doing." Croy said that she selected Robledo for lay off because "he had the least seniority out of the three that we looked at," and she named Robledo and the Arteaga brothers. Croy also seemed to suggest that another reason that Robledo was selected for lay off was because he "had recently had a disciplinary action," and when she heard about it, she felt "it was a terminable offense." Further, she testified that in deciding to lay off Robledo, she did not talk with anyone about his involvement with the Union.

On cross-examination, Croy acknowledged that both Meza and Robledo were hourly paid employees, while the Arteaga brothers were salaried employees. Further, she admitted that Robledo was the only employee in the shipping department who actually lost his job through a lay off. Two other shipping department employees were given transfers into the production department. Meza was allowed to remain in the shipping department, but not as a senior lead. Robledo had seniority over Meza. Croy justified not giving a transfer to Robledo or allowing him to remain in the department, in other than a senior lead position, on the basis that he had previously received a "verbal warning," and a "demotion" might "upset" him, and lead to "further incidents."

I did not find Erika Croy to be a credible witness. Her testimony was inherently implausible. The story she tells about why Robledo was selected for lay off, rather than Meza, or apparently anyone else in the department, is convoluted. He had seniority over Meza, and as a senior lead, he must have had more value to the Respondent than a rank and file employee. Never the less, he is the one department employee chosen for lay off. Croy testified in a disjointed and confused fashion, despite obviously being an intelligent and articulate individual. In my opinion, her confusion was a product of trying to contrive a plausible explanation for a course of action that made sense only if the Respondent's true aim in laying off Robledo was to rid itself of a union supporter. Further, Croy's denial that she had any knowledge of which employees had supported the Union, or that she discussed Robledo's union activity with anyone prior to his termination, defies credulity. While Croy arrived on the scene two months after the representation election, it is inconceivable that an election campaign, which had caused the Respondent to hold 80 captive audience meetings with its employees, would not have been discussed at some length with the new plant manager. Certainly she knew that Robledo had been an active union supporter. To suggest other wise is simply not credible.

Irma Elioff testified that she and Croy discussed the need to reduce the number of employees in the shipping department before Croy made the decision to layoff Robledo. Elioff was of the view that the department was "top heavy" with supervisors. She described Robledo as a "disgruntled employee," and candidly admitted on cross-examination that he had been unhappy since the Union lost the election. She felt that to "demote" Robledo and "give him a cut in pay would only make him that much more disgruntled." However, the Respondent was obviously willing to offer the opportunity to Meza, who had less seniority. As Elioff indicated, the Respondent did not even give Robledo the option of a demotion.

Elioff attempts to distinguish Robledo by indicating that he had called his co-workers derogatory names for not having voted for the Union. However, he apparently never received any discipline for this alleged misconduct. In August 2002, he had received a verbal warning for allegedly "giving the finger" to a supervisor. (Res. Exh. 22.) That was apparently the disciplinary action that Croy had made reference to. In any event, Croy acknowledged that Robledo had received no further disciplinary action from August through the time of his layoff. Further, Elioff testified that in discussing the reduction in force in the shipping department, she had never mentioned anything to Croy about Robledo's union activity. Although I have found that Elioff generally testified credibly, in this one instance I do not believe her. It is simply inconceivable

that only three months after the election campaign, in which the Respondent had so vigorously participated, that Elioff would not have at least mentioned to the new plant manager the prominent support that Robledo had given to the Union.

I believe that Macario Robledo testified credibly. He testified in a calm, quiet way, and I was left with the impression that his testimony was without exaggeration or embellishment. He admitted giving a co-worker the finger and receiving a verbal warning for the incident, but denied that he had called any employees derogatory names. Also, he testified in a straightforward way about his union activity, as noted earlier.

Applying the standards and factors as set forth by the Board in *Wright Line, supra*; and *Tracker Marine, supra*, I conclude that the General Counsel has established a *prima facie* case that Robledo's union activity was a motivating factor in the Respondent's decision to terminate him. There is no doubt that Robledo engaged in significant union activity. As is enumerated above, he distributed union flyers in the Respondent's parking lot during lunch and break periods for approximately 30 days. Further, he was the observer for the Union at the election. This union activity was "open and notorious," and obviously the Respondent would have been fully aware of its occurrence. I have found Erika Croy to be incredible and, thus, discount her denial that she was aware of Robledo's union activity. Of course, Elioff and Dominguez were heavily involved in the Respondent's campaign to defeat the Union and, so, would have been very aware of Robledo's involvement.

There can be no doubt that Robledo suffered an adverse employment action. He was terminated from his job with the Respondent. He had been employed at the facility since 1988. The Respondent refers to this job action as a "lay off," but regardless of the semantics, the result was the same. Robledo lost his job.

Regarding the question of whether there exists a link or nexus between Robledo's union activity and his termination by the Respondent, I believe that the evidence establishes such a connection. While the lay off came approximately three months after the representation election, certainly memories of the campaign were still fresh in the minds of the Respondent's managers. The Respondent had put forth a maximum effort to defeat the Union in the campaign. This campaign was not simply some academic exercise on the part of the Respondent. Rather, the managers had conducted approximately 80 captive audience meetings over a three-month period in an effort to remain non-union.

In my view, the degree to which the Respondent conducted its election campaign is some evidence demonstrating animus toward the Union and its supporters. Animus or hostility toward an employee's union activity may be inferred from all the circumstances, even without direct evidence. *Shattuck Denn Mining Corp., v. NLRB*, 362 F.2d 466, 62 LRRM 2401, 2404 (9th Cir. 1966); and *U.S. Soil Conditioning Co*., 325 NLRB 762 (1978). I believe that such an inference is warranted here. The Respondent engaged in a very aggressive campaign to defeat the Union's organizing efforts. While an employer certainly has the legal right to oppose a union's organizing efforts, by the extent and method of their efforts, this Respondent's managers made sure the employees understood that this was not simply business as usual.

In any event, there is also ample direct evidence of animus directed toward the Union and its supporters. As is noted above, I have found that during the campaign, the Respondent did violate Section 8(a)(1) of the Act by promising employees at group meetings new and/or enhanced benefits in order to induce the employees to abandon their support of the Union. Specifically, the benefits entailed the creation of a gainsharing bonus, and the grant of at least one additional paid holiday. By promising these new and/or enhanced benefits, I conclude that

the Respondent was interfering with, restraining and coercing employees in the exercise of their Section 7 rights. Such conduct constitutes *prima facie* evidence of anti-union animus on the part of the Respondent.

The General Counsel, having met his burden of establishing that the Respondent's actions in terminating Robledo were motivated, at least in part, by anti-union considerations, the burden now shits to the Respondent to show that it would have taken the same action, absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community, supra*; Regal *Recycling, Inc., supra*. The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc.*, *supra*. The Respondent has failed to meet this burden.

It is the Respondent's position that Robledo was "laid off" because of an economic reduction in force. The Respondent's new plant manager, Erika Croy so testified. However, for the reasons stated earlier, I found Croy to be incredible, and her explanation for the layoff to be a fabrication. It may very well be that the facility was having significant economic problems and that the Respondent needed to reduce its labor costs. The elimination of 70 temporary employees would indicate that was the case. However, while the Respondent contends that some permanent employees were also eliminated through lay off, there was no testimony establishing how many such employees were allegedly part of the reduction in force. In its post-hearing brief, counsel for the Respondent cites to what appears to be a computer generated document entitled "Terminated Employees from August 2001 thru July 2003." (Jt. Exh. 3.) This document apparently lists those employees of the Respondent who were separated from their employment for any reason during the specified time period. It lists a number of employees as having been separated because of "layoff." However, there is no specific information as to why these particular employees were selected, nor do most of the dates of the other layoffs correlate with the date of Robledo's layoff. I do not believe that this document supports the Respondent's position. Never the less, it does establish one very significant point, that being that for the period covered, the only shipping and receiving department employee listed as a layoff is Robledo.

Croy's contention that an additional reason for Robledo's selection for lay off was because he had previously been disciplined, appears to be an effort to "grasp at straws." His discipline for having given his supervisor the finger in August was a verbal warning. It is simply incredible that two months later, Croy would have been concerned enough about a disciplinary incident, which merited only a "verbal warning," to consider it as support for her alleged economic decision to select Robledo for lay off. More accurate was likely Elioff's testimony that she viewed Robledo as a "disgruntled employee," who had been unhappy since the Union lost the election.

I am convinced that Robledo was selected for layoff because he was viewed as a union supporter. The Respondent's contention that he was selected as the only shipping department employee for layoff, essentially because as a senior lead he was the most expendable, makes no sense. Robledo had more seniority than senior lead Meza. However, Meza was allowed to remain in the department, although not as senior lead. The only logical reason why Robledo was not offered that opportunity, or the option of transferring to another department, was because of his union activity.

I find the Respondent's stated explanation for terminating Robledo to constitute a transparent pretext. Accordingly, the Respondent has failed to rebut the General Counsel's *prima facie* case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because of Robledo's union activity.

Williams Contracting, Inc., 309 NLRB 433 (1992); *Limestone Apparel Corp*., 255 NLRB 722 (1981), enf'd., 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp. v. NLRB*, 326 F.2d 466, 470 (9th Cir. 1966).

Accordingly, I find and conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act by terminating Macario Robledo in October 2002, as alleged in paragraphs 6(c) and 9 of the complaint.

5. Summary

As is reflected above, I recommend dismissal of the following paragraphs of the complaint: 6(a), 6(b), and 6(e), 7(a), 7(b), 7(c), 7(d), 7(e), but only as to listed items (2), (4), and (5), 7(f) and 7(g).

Further, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in paragraph 7(e) (1) and (3), and paragraph 10 of the complaint. Also, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in paragraphs 6(c) and 9 of the complaint.

IV. The Objections to the Election

The Petitioner filed objections to the election, many of which are coextensive with the allegations of the complaint. In the Regional Director's Report on Objections and Order Consolidating Cases (G.C. Exh. 1(ff).), she ordered that those objections that are coextensive be consolidated with the complaint allegations and heard by the undersigned who should, thereafter, make a recommendation to the Board as to the disposition of said objections. Those objections, which are coextensive, are numbered 1, 2, 7, 8, 12, 13, 14, 15, 19, and that portion of objection number 6 as concerns the suspension of Guadalupe Ortiz.[28]

Additionally, the Petitioner's objection number 20 is not coextensive with any of the allegations of the complaint. In this objection, the Petitioner asserts that the Employer failed to properly post the Notices of Election for three full working days in advance of the election on July 9 and 10, 2002. In the Regional Director's report, she ordered that objection number 20 be heard at the same time as the other objections, and that the undersigned make a recommendation to the Board as to its disposition. The Employer has denied committing any objectionable conduct.

After a careful review of those objections which the Regional Director found to be coextensive with certain complaint allegations, it is apparent to me that objections numbers 1, 2, 6, as it concerns the suspension of Guadalupe Ortiz, 7, 8, 13, 15, and 19 are without merit. These objections are coextensive specifically with the complaint allegations that I have found to be without merit, for the reasons stated earlier in this decision, and for which I have recommended dismissal. Accordingly, I hereby recommend that objections numbers 1, 2, 6, as it concerns the suspension of Guadalupe Ortiz, 7, 8, 13, 15, and 19 be overruled.

[28] In her Report on Objections and Order Consolidating Cases, the Regional Director approved the Petitioner's request to withdraw objections numbers 3, 4, 5, 9, 10, 11, 16, 17, 18, 21, an unnumbered objection, and that portion of objection number 6 as does not concern the suspension of Guadalupe Ortiz.

However, regarding objections numbers 12 and 14, I find that they have merit. Objection number 12 essentially mirrors the unfair labor practice allegation found in complaint paragraph 7(e)(1), that being that the Respondent promised new and /or enhanced benefits to employees in the form of a gainsharing bonus in order to induce them to abandon their support for the Union. Objection number 14 essentially mirrors the unfair labor practice allegation found in complaint paragraph 7(e)(3), that being that the Respondent promised new and/or enhanced benefits to employees in the form of additional paid holidays in order to induce them to abandon their support for the Union. As I have indicated above, I conclude that the Respondent violated Section 8(a)(1) of the Act by its conduct as alleged in these two complaint paragraphs.

As found by the undersigned, the Respondent has committed the above unfair labor practices during the critical period between the filing of the petition and the election.[29] It is well settled that conduct during the critical period that creates an atmosphere rendering improbable a free choice warrants invalidating an election See *General Shoe Corp*., 77 NLRB 124 (1948). Such conduct is sufficient if it creates an atmosphere calculated to prevent a free and untrammeled choice by the employees. As the Board stated, in election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees. *General Shoe Corp., supra*.

The Respondent has committed significant unfair labor practices, by promising employees new and/or enhanced benefits in order to induce them to abandon their support for the Union, during the critical period, which unfair labor practices also constituted objectionable conduct. The Board has traditionally held that conduct violative of Section 8(a)(1) of the Act is also conduct which interferes with the exercise of a free and untrammeled choice in an election. *Dal-Tex Optical*, 137 NLRB 1782, 1786 (1962); and *IRIS U.S.A., Inc*., 336 NLRB 1013 (2001). None of the unfair labor practices committed by the Respondent during the critical period would constitute a *de minimis* exception to that general proposition as recognized by the Board. *Bon Appetit Management Co*., 334 NLRB 1042 (2001); and *Caron International, Inc*., 246 NLRB 1120 (1979). Section 8(a)(1) violations fall within the de minimis exception only when these violations "are such that it is virtually impossible to conclude that they could not have affected the results of the election. *Super Thrift Markets*, 233 NLRB 409, 409 (1977), cited in *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000).

In the matter at hand, the Employer's supervisors and agents, including Irma Elioff and Daniel Mani,[30] who was at the time a consultant and agent, made presentations to groups of employees where they were informed about the addition of a gainsharing bonus and at least one additional paid holiday. These were significant benefits, the news of which would have been widely disseminated and designed to influence the voters to reject the Union. I am of the opinion that such promised future benefits would likely have influenced the outcome of the election. Despite the significant majority of employees who voted against the Petitioner, I do not believe "that it is virtually impossible to conclude that the election outcome has been affected" by the Employer's objectionable conduct. *Super Thrift Markets*.

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[29] Complaint paragraph 7(e), as amended at the hearing, alleges that the specified conduct occurred between May and June 2002, and I so find, as it involves the gainsharing bonus and additional holidays.

[30] Daniel Mani was known to at least some of the employees as the person who formally was the Employer's chief executive at the facility. This would likely have given addition significance to any of his statements.

I conclude that the unfair labor practices committed by the Respondent during the critical period constituted objectionable conduct that interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. These were significant unfair labor practices, which would clearly have had a tendency to seriously inhibit the employees' willingness to engage in union activity, and would likely have created an atmosphere unconducive to a free and untrammeled choice by the employees. The Employer's conduct destroyed the laboratory conditions required by the Board. Therefore, I recommend that the election be set aside and a new election conducted.

Further, there is another reason why the election must be set aside. In objection number 20, it is alleged that the Employer failed to post the Notice of Election 72 hours "prior to the opening of the voting polls." Section 103.20 of the Board's Rules and Regulations provides in pertinent part:

> Posting of election notices.---(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election…. In all cases, the notices shall remain posted until the end of the election.
>
> (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
>
> (d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of section 102.69(a).

As counsel for the Petitioner stated in his post-hearing brief, the above rule has been "strictly enforced" by the Board. The Board has set aside an election result and ordered a new election even in cases where the employer acted in good faith and complied "substantially," but not "fully," with Section 103.20. *Smith's Food and Drug*, 295 NLRB 983, 983-84 (1989). Also, in *Terrace Gardens Plaza*, 313 NLRB 571, 572 (1993), the Board made it clear that "the Rule's provisions do not allow for any analysis as to the actual impact of noncompliance on a particular election."

In the matter at hand, the election took place on Tuesday and Wednesday, July 9 and 10, 2002. Under Section 103.20, the election notices had to be posted no later than 12:01 a.m. on Wednesday, July 3, the third full working day before the day of the election, " excluding Saturdays, Sundays, and holidays" such as the 4th of July. Further, under the Rule, the notices had to remain posted from that time and date until the end of the election. It is the Petitioner's position that the notices were not posted as of 12:01 a.m. on July 3, and, therefore, the election must be set aside and a new election must be ordered. I agree.

A number of employee witnesses testified on behalf to the Petitioner that they did not see the posted notices at the facility until some time substantially after July 3. These witnesses included Griselda Hernandez, Bella Amar Aguirre, and Macario Robledo. However, it is not necessary for the undersigned to decide on the accuracy of their testimony. The Respondent's human resources manager, Irma Elioff, testified that she ordered the election notices posted. Giving the Respondent the "benefit of the doubt," and fully crediting Elioff's testimony, I must conclude that the notices were not posted by the requisite time on July 3.

According to the testimony of Elioff, she received a call from Jimmy Phillips, who works for the Employer at the corporate headquarters in St. Louis. While she did not specifically say that she received the call on July 3, that was clearly the date, as she testified that, "The 4th of July was going to be the following day and we were going to be getting paychecks early." Phillips told her that it was very important that the Board notices get posted, "that they were required to be posted three days prior to the election." After she hung up the phone, Elioff thought to herself, "Does that include Saturday and Sunday? Is it workdays or does it include the weekend? So, I did not want to risk it."

Elioff testified that she then asked her assistant, Arlet Moranda, "to please post them, as soon as possible." She went on to describe the bulletin boards where the notices were to be posted, and how Plexiglas covers held on by 15 screws had to be removed before the notices could be placed on the bulletin boards. According to Elioff, because of the mechanics involved in removing the covers, she wanted her assistant "to post it immediately." In response to counsel for the Employer's question, "So, the poster was up, before the 4th of July holiday?" Elioff responded," Absolutely." She went on to say that the notices were posted on the employee lunchroom bulletin board and on the bulletin board by the reception entrance. Both bulletin boards had Plexiglas covers.

Accepting Elioff's testimony as accurate, she had conversations with Jimmy Phillips and Arlet Moranda and the Plexiglas covers had to be removed from both bulletin boards, all before the notices were actually posted. Certainly the two conversations and the removal of the Plexiglas covers all took some time. Elioff does not say specifically what time the conversation with Jimmy Phillips occurred. It is certainly reasonable to assume that the conversation took place no earlier than when Elioff arrived at work on the morning of July 3, presumably at around 7 or 8 a.m. However, even if I were to conclude that Elioff was at the facility at midnight,[31] it would clearly be impossible for Elioff to have had two conversations and for the Plexiglas covers to have been removed from the bulletin boards and the notices posted, all before 12:01 a.m. on July 3.

Elioff's testimony establishes that the Employer did not post the election notices three full working days prior to the day of the election. In order to comply with Section 103.20 of the Boards Rules, notices must have been posted by no later than 12:01 a.m. on July 3. That did not happen. Most likely, the notices were not posted until sometime after 7 or 8 a.m. on the morning of July 3. Even in a "best case scenario" for the Employer, although highly unlikely, the notices were posted sometime after 12:01 a.m. Such a scenario would have to allow time for two telephone conversations and the removal of the Plexiglas covers, meaning the notices would have not been posted until substantially after the required time.

Under existing Board law, strict enforcement of the posting requirement of Section 103.20 is required. See *Smith's Food and Drug, supra*; and *Terrance Gardens Plaza, supra.* Thus, any late posting of the election notices by the Employer, even by minutes, necessitates that the election results be set aside and that a new election be ordered. That is all the more true where in all likelihood, the notices were not posted by the Employer until at least the start of

[31] It is, of course, highly unlikely that Eioff would have been at the facility at midnight (12:00 a.m.) on July 3. It is equally unlikely that either Jimmy Phillips or Arlet Moranda would have been at their respective offices at that hour. For all three individuals to have been at work at midnight is so unlikely as to be fanciful.

Elioff's work day on the morning of July 3, some 8 or more hours after the requisite hour for posting. Accordingly, for this additional reason, I recommend that the election be set aside and a new election conducted.

Concomitantly, it appears that the Employer's posting of the notices was deficient for another reason. In his post-hearing brief, counsel for the Petitioner contends that the Employer also did not adhere to the requirements of Section 103.20 of the Rules, because the Employer did not post the notices for three full working days prior to the day of the election in both English and Spanish. This issue was full litigated at the hearing with extensive witness testimony being offered as to specifically what employees saw when they observed the posted notices. Further, I find that objection number 20 is worded broadly enough to encompass the question of whether the requirement of notice posting for three full working days was violated because the posted notices were allegedly in English only.

As I have indicated, numerous employee witnesses called by the Petitioner testified about what they saw and when they saw it regarding the posting of the notices. However, I do not believe it necessary to determine the correctness of any of their testimony. Instead, I will again give the Employer the "benefit of the doubt," and credit the testimony of its witness, Maria del Carmen Estrada. Earlier in this decision, I found Estrada's testimony to be confusing and largely incomprehensible. Never the less, I found her to be credible in the sense that she was attempting to testify truthfully, and that any confusion was likely the product of limited education and loss of continuity in the translation from Spanish to English. I still find this to be so.

Estrada testified that she took several pictures of her fellow workers before July 4.[32] These pictures also show the notice posted at one location, the employee lunchroom bulletin board. (Res. Exh. 6 & 7.) It is apparent after viewing one of those photographs that the notice posted on that bulletin board, which notice is fully displayed, was primarily an English language version of the notice. There is no Spanish language version of the notice anywhere in the picture. (Res. Exh. 7.) None of the Employer's witnesses, including Elioff, dispute this. It is clear from the record that the Regional Director provided election notices to the Employer for posting in both English and Spanish. (Jt. Exh. 2a & 2b.) It is equally clear that many, if not most, of the employees who were eligible to vote were native or primary speakers of Spanish. In fact, with only a few exceptions, almost all of the employee witnesses at the hearing required the aid of an English to Spanish interpreter. Therefore, the need for both Spanish and English notices was obvious. The only issue remaining is whether the absence of a Spanish language notice on at least July 3 at the lunchroom location is a sufficient basis to set aside the results of the election. I believe that it is.

Under existing Board law, the Employer's failure to also post the notice in Spanish is another independent reason why the election result must be set aside and a new election ordered. In *Flo-Tronio Metal Mfg*., 251 NLRB 1546 (1980), where only a portion of the notice was in both English and Spanish, the Board held that the election should be set aside. According to the Board, the notice contains, among other matters, "important information with respect to the rights of employees, the purpose of which is to alert them as to their rights under the Act and to warn unions and management alike against conduct impeding a free and fair election." Further, the Board found that the "failure to include in the notice a full statement of rights of employees in both English and Spanish…constitutes interference with the election…."

[32] I conclude that these pictures were taken sometime on July 3, following the posting of the notices. This would comport with the testimony of Elioff, who indicated that the notices were posted sometime on that date.

Also, In *Rattan Art Gallery*, 260 NLRB 255 (1982), the Board held that the Regional Director's failure to have the notice fully and accurately translated into the Filipino language, which language was the primary language of certain employees who could neither read nor speak English, "destroyed the laboratory conditions for holding a fair election." The Board concluded that the employees were "deprived of an opportunity to discuss election issues with fellow employees," and ordered a new election.

In the matter at hand, the Respondent failed to follow the requirements of Section 103.20 of the Rules by failing on at least part of one day, July 3, to post the election notice in the employee lunchroom in both English and Spanish. This deprived the Spanish-speaking employees, of which there were a significant number, of an opportunity to obtain an explanation of their rights under the Act, an explanation of the purpose and conduct of the election, and to discuss election issues with fellow employees. As such, "the laboratory conditions for holding a fair election" were destroyed. *Rattan Art Gallery*. Accordingly, for this additional reason, I recommend that the election be set aside and a new election be conducted.

In summary, I have concluded that the Petitioner's objections numbers 12 and 14, which are coextensive with certain unfair labor practices committed by the Employer, have merit. Further, I have found that the Petitioner's objection number 20 has merit, both as to the Employer's failure to post the election notices for three full working days prior to the day of the election, and to post said notices in Spanish as well as English. Further, I have found that the Employer's objectionable conduct destroyed the laboratory conditions for an election required by the Board. Therefore, I have recommended that the election be set aside and a new election conducted.

Conclusions of Law

1. The Respondent, Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 37, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Promising new and/or enhanced benefits to employees in the form of a gainsharing bonus and additional paid holidays, in order to induce them to abandon their support for the Union.

4. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (3) of the Act:

(a) Discharging its employee Macario Robledo.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not committed the other violations of law that are alleged in paragraphs 6(a), 6(b), and 6(e), 7(a), 7(b), 7(c), 7(d), 7(e), but only as to listed items (2), (4), and (5), 7(f), and 7(g) of the complaint.

7. By the conduct set forth in Conclusions of Law 3(a), above, and by its failure to post the Notice of Election in Spanish and English for three full working days prior to the day of the election, the Respondent has improperly interfered with the representation election conducted by the Board in Case 21-RC –20465. Accordingly, I recommend that the election be set aside and a new election be conducted at a date and time to be determined by the Regional Director for Region 21.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employee Macario Robledo, my recommended order requires the Respondent to offer him immediate reinstatement to his former position, displacing if necessary any replacement, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges. My recommended order further requires the Respondent to make Robledo whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date the Respondent makes a proper offer of reinstatement to him, less any net interim earnings as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The recommended order further requires the Respondent to expunge from its records any reference to the discharge of Robledo, and to provide him with written notice of such expunction, and inform him that the unlawful conduct will not be used as a basis for further personnel actions against him. *Sterling Sugars, Inc*., 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Robledo in any other way. Finally, the Respondent shall be required to post a notice that assures the employees that it will respect their rights under the Act.

Additionally, as indicated above, I have found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 21- RC- 20465. I recommend, therefore, that the election in this case held on July 9 and 10, 2002, be set aside, that a new election be held at a date and time to be determined in the discretion of the Regional Director for Region 21, and that the Regional Director include in the notice of the election the following:

NOTICE TO ALL VOTERS

> The election held on July 9 and 10, 2002, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' free exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast ballots as they see fit and protects them in the exercise of this right free from interference by any of the parties.[33]

[33] *Lufkin Rule Co*., 147 NLRB 341 (1964).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Promising new and/or enhanced benefits to employees in the form of a gainsharing bonus and additional paid holidays, in order to induce them to abandon their support for the Union; and

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the polices of the Act:

(a) Within 14 days from the date of this Order, offer Macario Robledo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed;

(b) Make Macario Robledo while for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision;

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Macario Robledo, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way;

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

(e) Within 14 days after service by the Region, post at its facility in Vernon, California, copies of the attached notice (in both English and Spanish) marked "Appendix."[35] Copies of the notice (in both English and Spanish), on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the

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[34] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[35] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice (in both English and Spanish) to all current employees and former employees employed by the Respondent at any time since April 1, 2002; and

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the Regional Director for Region 21 shall set aside the representation election in Case 21-RC-20465, and that a new election be held at a date and time to be determined in the discretion of the Regional Director.

Dated at San Francisco, California on December 2, 2003.

_____
Gregory Z. Meyerson
Administrative Law Judge

JD(SF)-88-03
Los Angeles, CA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT layoff, discharge, or otherwise discriminate against any of you for supporting the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 37, AFL-CIO, CLC (the Union), or any other union.

WE WILL NOT promise you new and/or improved benefits or working conditions in order to discourage you from supporting the Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, offer Macario Robledo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Macario Robledo whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Macario Robledo, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5229

JD(SF)-88-03
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

**SARA LEE BAKERY GROUP,
d/b/a INTERNATIONAL BAKING
COMPANY AND EARTHGRAINS**

and **Cases 21-CA-35073**
21-CA-35075
21-CA-35090
21-CA-35146
21-CA-35153
21-CA-35224

BAKERY, CONFECTIONERY AND TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 37, AFL-CIO, CLC **21-CA-35371**
21-CA-35372
21-RC-20465

TABLE OF CONTENTS